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Supreme Court, U.S.
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No. 00-1334

IN THE

Supreme Court of the United States

BOBBY W. KENNEDY, ET AL.,
Petitioners,

v.

FRIGIDARE COMPANY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES TO THE PROCEEDING AND RULE 29. 6 CORPORATE DISCLOSURE STATEMENT

Petitioners, who were plaintiffs in the underlying lawsuit, are Bobby W. Kennedy, Carolyn J. Kennedy, and Jimmy P. Kennedy. Defendants were Frigidaire Company, White Consolidated Industries, Inc., Russ Ashley, Crawford & Company, Richard Keith, Pyrtech Company, Lampton-Love, Inc., Allgas, Inc., C.L. Jimmy Fortenberry, Ronald Wayne Puckett, Bruce Laviner, and Sam's Club Inc., a division of Wal-Mart Stores, Inc.

This Brief is filed on behalf of White Consolidated Industries, Inc. and Frigidaire Company. White Consolidated Industries, Inc. is a wholly-owned subsidiary of A. B. Electrolux of Stockholm, Sweden. Electrolux is traded on the NASDQ as ELUX.

Frigidaire is a trade name for products manufactured and marketed by White Consolidated Industries, Inc.

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REASONS THE WRIT SHOULD BE DENIED

INTRODUCTION

The Kennedys' Petition for Writ of Certiorari seeks review of a summary judgment entered against them by an Alabama state trial court in a products liability case. The issues before the trial court solely involved the application of well-settled Alabama state law to the evidence presented. After summary judgment was entered against the Kennedys, they pursued an appeal in the Alabama Court of Civil Appeals.[1] That Court affirmed the summary judgment without issuing an opinion. Dissatisfied with that result, the Kennedys then sought certiorari review in the Supreme Court of Alabama, which denied their petition without opinion. Through their Petition filed in this Court, the Kennedys now ask this Court to review the summary judgment. As will be explained, Respondents White Consolidated Industries and Frigidaire (collectively hereafter "White Consolidated") believe that the Kennedys' Petition should be rejected because no substantial arguments concerning federal law were ever pursued by the Kennedys at the state court level, because none of the Alabama state courts in which the Kennedys have pursued this litigation ever passed on a matter of federal law, and because the summary judgment entered against the Kennedys

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[1] The Kennedys filed their Notice of Appeal in the Alabama Supreme Court, which then transferred the appeal to the Alabama Court of Civil Appeals pursuant to ALA. CODE § 12-2-7. That provision of the Alabama Code allows the Alabama Supreme Court to transfer an appealed civil case to the Alabama Court of Civil Appeals for decision, subject to certain enumerated exceptions which do not apply to this case. Once the Court of Civil Appeals has decided the case, it is then subject to discretionary review by the Alabama Supreme Court on a Writ of Certiorari. *See,* ALA. R. APP. P. 39.

did not infringe upon their rights under federal law and the United States Constitution.

This lawsuit originated with a Complaint which the Kennedys filed *pro se* in the Circuit Court of Marshall County, Alabama, seeking damages from Frigidaire Company, White Consolidated, Russ Ashley, Crawford & Company, Richard Keith, Pyrtech Company, Lampton-Love, Inc., Allgas, Inc., C. L. Jimmy Fortenberry, Ronald Wayne Puckett, Bruce Laviner, and Sam's Club, Inc. The essence of the Kennedys' claims against White Consolidated was that a defective clothes dryer manufactured by White Consolidated started a fire which burned their lake house.[2] After they filed suit, the Kennedys retained counsel, and were represented continuously thereafter until summary judgment was entered in favor of the defendants and the Kennedys' motion for post judgment relief was denied. The Kennedys then discharged their attorneys and began to prosecute *pro se* the appeal which has culminated in this Petition for Writ of Certiorari.

At the conclusion of briefing in the Alabama Court of Civil Appeals, that court affirmed the summary judgment without issuing an opinion, pursuant to ALA. R. APP. P. 53(a)(1) and ALA. R. APP. P. 53(a)(2)(F). These rules permit an Alabama appellate court to affirm a judgment or order of a trial court in a civil case without opinion if the appellate court determines that an opinion in the case "would serve no significant precedential purpose" and that the trial court's judgment or order "was entered without an error of law."

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[2] The lake house was unoccupied at the time of the fire. (C-743; p. 28).

The Court of Civil Appeals also clearly indicated that the Kennedys had failed to properly present and support any arguments which would warrant reversal of the trial court. In its Order affirming the summary judgment, the Alabama Court of Civil Appeals cited without discussion its prior opinions in *Messer v. Messer*, 621 So. 2d 1343 (Ala. Civ. App. 1993) and *Bishop v. Robinson*, 516 So. 2d 723 (Ala. Civ. App. 1987). In *Messer*, the Court of Civil Appeals affirmed a trial court judgment because it determined that the appellant's failure to properly present arguments in his brief resulted in a waiver of appellate consideration. Although the Court of Civil Appeals did reach the merits of the child custody dispute at issue in *Bishop*, it noted in its opinion that the appellant had failed to present issues to the Court "with clarity and without ambiguity." *Id.* at 724, *quoting, Thoman Engineering, Inc. v. McDonald*, 57 Ala. App. 287, 328 So. 2d 293 (Ala. Civ. App. 1976). Given the incongruity of the substantive issues before the Court in the Kennedys' case and those implicated by the appeal in *Bishop*, the Alabama Court of Civil Appeals presumably cited the *Bishop* opinion to point out the Kennedys' failure to properly present any arguments in support of their appeal.

SUMMARY OF THE ARGUMENT

White Consolidated does not believe that this case is one that is appropriate for this Court's certiorari review for several reasons. First, at least as it relates to the summary judgment entered in favor of White Consolidated, the Kennedys' appeal is one which involves claims asserted under the Alabama common law of products liability. The matters about which the Kennedys complain relate solely to the trial court's application of well-settled propositions of law to the facts and evidence.

Second, the briefs filed by the Kennedys in Alabama state court were technically inadequate and failed to present any substantial arguments of state or federal law. The Kennedys merely mentioned in passing the United States Constitution and federal civil rights laws without presenting any properly supported arguments to demonstate how their rights under federal law were violated in the trial court.

Third, the essence of the Kennedys' claims in both the state courts and now in this Court is that they were deprived of justice when the trial court entered summary judgment against them. This Court has long recognized the legitimate field of operation of summary judgment procedure. Summary judgment was appropriate in this case, and the Alabama courts have so recognized.

I. THIS COURT SHOULD DENY THE KENNEDYS' PETITION BECAUSE THE ALABAMA STATE COURTS DID NOT ADDRESS ANY ISSUE OF FEDERAL LAW IN THEIR DISPOSITION OF THE KENNEDYS' LAWSUIT, AND BECAUSE THE KENNEDYS FAILED TO PROPERLY PRESENT AN ISSUE OF FEDERAL LAW IN THE ALABAMA STATE COURTS.

This Court has held that the proper presentation of a claim under federal law is usually a prerequisite to certiorari review of a state court decision. As this Court noted in *Adams v. Robertson*, 520 U.S. 83, 86 (1997):

> With 'very rare exceptions'. . . we have adhered to the rule in reviewing state court judgments under

> *28 U.S.C. § 1257* that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. [citation omitted].

Although their Petition is somewhat difficult to follow, it does not appear that the Kennedys have attempted to demonstrate to this Court that a federal question was addressed by an Alabama state court. The Kennedys could not make such a showing, in any event.

In *Webb v. Webb*, 451 U.S. 493, 495 (1981), this Court stated as follows:

> . . . [w]hen 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

The Alabama state courts did not pass on any matters of federal law in affirming the summary judgment. Accordingly, under this Court's holding in *Webb*, the Kennedys must affirmatively demonstrate that they properly presented a federal question to the state courts.

In the Notice of Appeal filed by the Kennedys following the trial court's entry of the summary judgment, the only reference they made to federal law was the assertion that the entry of the summary judgment against them violated "the plaintiffs' state and federal right [sic] . . . ." (C-1433). In their initial and reply briefs to the Alabama Court of Civil Appeals, the Kennedys did not cite any federal statutes or the Constitution of the United States. They further discussed no federal case law in arguing for reversal of the summary judgment

other than citing two federal cases for the general proposition that they were entitled to have the evidence viewed in a light most favorable to them as the non-moving party.[3] (Reply Brief of Appellant, p. 20). In their initial brief to the Alabama Court of Civil Appeals, the Kennedys contended that their "civil and constitutional rights" were violated by the trial court's admonition to the Kennedys that they should not attempt to prosecute their lawsuit *pro se*, by the trial court's resolution of a discovery dispute, and by entry of the summary judgment. (Brief of Appellants, pp. 2; 6; 11; 49). At one point in that same brief, the Kennedys also asserted that the trial court's decision to grant summary judgment was a violation of their "state and federal constitutional rights." (Brief of Appellants, p. 21). The only arguments made by the Kennedys on the merits of this claim, however, involved whether the summary judgment was correct under Alabama precedent. In their reply brief to the Court of Civil Appeals, the Kennedys contended at one point that their "civil rights have been violated in this case" but once again, they failed to present any arguments under federal law to support that contention. (Reply Brief of Appellants, p. 8). The Kennedys' arguments concerning the actions taken in the trial court were couched solely in terms of state substantive law. Not only did the Kennedys fail to present any arguments to the Court of Civil Appeals concerning the manner in which their rights under federal law were implicated, the citations included in the Order of the Court of Civil Appeals affirming the summary judgment without opinion indicated that the

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[3] *Rollings v. TechSouth, Inc.*, 833 F.2d 1525 (11th Cir. 1987); *Barnes v. Southwest Forest, Inc.*, 814 F.2d 607 (11th Cir. 1987).

Kennedys had failed to present cogent and adequately supported arguments on their claims under state substantive law as well.

Once the Alabama Court of Civil Appeals affirmed the summary judgment, the Kennedys then sought discretionary certiorari review in the Alabama Supreme Court. In their Petition and Supporting Brief, the Kennedys were somewhat more specific in referring to federal constitutional and statutory claims. (Writ of Certiorari Brief, p. 4; 8, 9; 11). They contended that the entry of the summary judgment against them violated their "constitutional rights to a fair access to the court. Federal Constitutions Civil Rights Act 1964, Title VII and the Fourteenth Amendment to the U. S. Constitution and the Alabama Constitution under due process and discrimination [sic]." (Writ of Certiorari Brief, p. 9). They also stated that the trial judge was "biased against them" and that they were "retaliated against" by the trial judge in violation of "the Equal Protection Clause" and "The Civil Rights Act of 1964 the U. S. Constitution and the amendment of 1991 under Title VII." (Writ of Certiorari Brief, p. 11). Once again, however, the Kennedys attempted to support their arguments with state substantive law.[4] As this Court reaffirmed in *Adams v. Robertson*, *supra*, when a state court fails to

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[4] The Kennedys did cite *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), *Warrior Tombigbee Transp. Co., Inc. v. M/V Fung*, 695 F.2d 1294 (11th Cir. 1983), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 2421 (1986) in their "Writ of Certiorari Brief," but cited no authority to support any conclusion that their rights under federal law had been infringed. (Writ of Certiorari Brief, pp. 7; 10). These federal court opinions were cited for general propositions of law concerning the standards for admission of expert testimony and for granting or denying a motion for summary judgment.

address a federal question later presented to this Court on petition for writ of certiorari, the petitioner must overcome a presumption that the federal issue was not properly presented to the state court "by demonstrating that the state court had a 'fair opportunity to address the federal question that is sought to be presented here.'" *Id.* at 86, 87. The Kennedys have failed to rebut that presumption, and this Court should deny their Petition for Writ of Certiorari.

II. THE ACTIONS COMPLAINED OF BY THE KENNEDYS DO NOT AMOUNT TO VIOLATIONS OF THEIR FEDERAL CONSTITUTIONAL RIGHTS OR OF ANY FEDERAL STATUTE.

The summary judgment which the Kennedys seek to overturn was entered against them by the trial court in accordance with Rule 56 of the Alabama Rules of Civil Procedure. That rule is substantially the same as its federal counterpart. White Consolidated presented a properly supported Motion for Summary Judgment to the trial judge. The Kennedys failed to introduce sufficient evidence in opposition to that Motion to demonstrate the existence of a genuine issue of material fact. Specifically, the Kennedys' proffered expert witness admitted that he was "speculating" about what might have caused the fire at the Kennedys' lake house.[5] (C-486; p. 181). Moreover, the Kennedys failed to present any properly authenticated evidence to support the claims they have continued to make in this Court concerning product recalls. In particular, the Kennedys

[5] The local fire marshal testified that the dryer was not located at the fire's point of origin, and that he believed the fire was caused by a defective ceiling fan. (C-754, 755, pp. 32; 34; 36; 38).

failed to demonstrate that those recalls related to the specific model of dryer which they had purchased for their lake house. This Court has recognized the propriety of a trial court's entry of summary judgment under FED. R. CIV. P. 56 in a "run-of-the-mill civil case" when a plaintiff fails to present evidence from which "a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1985).

Unquestionably, the proper employment of summary judgment procedure does not deprive a litigant of the right to trial by jury. Moreover, this Court has explicitly recognized the salutary purpose served by summary judgment procedure:

> The Federal Rules of Civil Procedure have for almost fifty years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

The Kennedys' claim that their rights under federal law and the United States Constitution were violated by the trial court's entry of summary judgment has no merit.

After the Kennedys lost their case in the Alabama Court of Civil Appeals, they claimed for the first time in their Petition for Writ of Certiorari to the Alabama Supreme Court that summary judgment should not

have been granted against them because of two prior holdings of the Alabama Supreme Court, *White Consolidated Ind., Inc. v. Wilkerson*, 737 So. 2d 447 (Ala. 1999), and *White Consolidated Ind., Inc. v. American Liberty Ins. Co.*, 617 So. 2d 657 (Ala 1993). (Writ of Certiorari Brief, pp. 2, 3; 5, 6; 12). The Kennedys claimed in their Petition for Writ of Certiorari to the Alabama Supreme Court that they were entitled to present their claims to a jury simply because the underlying lawsuits in *Wilkerson* and *American Liberty* were tried to a conclusion before juries. According to the Kennedys, they did not receive a measure of justice equal to the plaintiffs in those cases. The Kennedys appear to be making that same argument to this Court, and that argument is incorrect. The disposition of the *Wilkerson* and *American Liberty* cases has no bearing on the Kennedys' claims.

Wilkerson, *supra* involved a fire allegedly caused by an air conditioner, not a clothes dryer. *Id.* at 448. The plaintiffs presented definitive "cause and origin" evidence linking the air conditioner to the fire. *Id.* at 448. Likewise, in *American Liberty*, *supra*, the homeowner plaintiff testified that she had seen flames coming out of the back of the allegedly defective clothes dryer. *Id.* at 662. That dryer was not the same make or model as that upon which the Kennedys have based this lawsuit. These very important differences make the decisions in *Wilkerson* and *American Liberty* irrelevant to the summary judgment entered in the Kennedys' case.

White Consolidated is mindful of the workload of this Court and does not wish to add unnecessarily to that burden by engaging in excessive rejoinder to the unsupported assertions made in the Kennedys' Petition. Nevertheless, White Consolidated does not want to run

afoul of U.S. SUP. CT. R. 15.2, which admonishes the respondent to point out any perceived misstatements made in a Petition for Writ of Certiorari. Consequently, White Consolidated notes its disagreement with the Kennedys' assertion of judicial bias and their claims of dishonesty on the part of both the trial court and counsel for White Consolidated. The Kennedys' Petition to this Court refers to statements made by the trial court to the Kennedys, advising them to retain counsel to prosecute their lawsuit. Those statements do not, as the Kennedys claim, indicate that the trial judge was biased against them. Rather, the statements were made to the Kennedys in order to attempt to ensure that their claims were fully and properly presented in court by trained counsel. The Kennedys heeded this advice and retained counsel which represented them capably up to the point at which the Kennedys elected to continue their litigation through the state and federal appellate court systems.

White Consolidated also feels compelled to point out that the accusations made in the Kennedys' Petition of unlawful withholding and concealment of evidence by White Consolidated's counsel are unfounded. White Consolidated interposed valid objections to certain discovery requests made by the Kennedys' counsel. After reviewing *in camera* a submission made by White Consolidated in the course of resolving those objections, the trial court determined that the objections were well taken.[6] This determination was made against the

[6] The Kennedys first notified White Consolidated about the fire approximately a year and a half after it occurred by sending a letter to White Consolidated. By then, the fire scene had already been examined twice by Mr. Kennedy's co-worker Steve Hollich, who the Kennedys eventually designated as their expert witness.

Continued on next page

backdrop of Alabama law concerning the proper scope of discovery in civil cases and it did not result in any infringement on the Kennedys' rights under federal law or the United States Constitution.

Footnote 6 continued

In response to this letter, White Consolidated retained Crawford & Company to investigate. Crawford & Company then retained Pyrtech to inspect the fire scene. Mr. Richard Keith of Pyrtech later wrote White Consolidated a letter, slightly over a page in length. In that letter, Mr. Keith stated that while exposure to the elements had degraded the dryer, he did not believe that the dryer caused the fire. After *in camera* review of that letter, the trial court sustained White Consolidated's objection to producing it. The Kennedys are referring to this letter when they accuse White Consolidated's counsel of withholding evidence and lying to the trial court. (White Consolidated's Response to Appellants' "Motion to Complete Official Court Record Transmitted To The Appeals Court").

CONCLUSION

The matters presented by the Kennedys' Petition for Writ of Certiorari do not warrant this Court's review. Their Petition should be denied.

Respectfully submitted,

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